

# Exhibit 15

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Los Angeles Superior Court

NOV 21 2005

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

19 ROBERT HULL, JOSEPH HALPIN and  
EDWIN BONNER, on behalf of themselves  
and all others similarly situated

1 Case No BC343385

**CLASS ACTION COMPLAINT**

JURY TRIAL DEMANDED

21 Plaintiffs,  
22 v.  
23 SONY BMG MUSIC ENTERTAINMENT  
CORP., SONY CORPORATION OF  
AMERICA, and BERTELSMANN, INC.

### Defendants

27 Plaintiffs, by and through their attorneys, bring this action on behalf of themselves and all  
28 others similarly situated, and allege against Defendants as follows: (b) (5)

**CLASS ACTION COMPLAINT**

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## INTRODUCTION

2       1. By including a flawed and overreaching computer program in over 20 million  
3 music CDs sold to the general public, including California residents, Sony BMG has created  
4 serious security, privacy and consumer protection problems that have damaged Plaintiffs and  
5 thousands of other Californians. At issue are two software technologies – MediaMax and  
6 Extended Copy Protection, also known as XCP – which defendant Sony BMG claims to have  
7 placed on the music CDs to restrict consumer use of the music on the CDs but which in truth do  
8 much more, including monitoring customer listening of the CDs and installing undisclosed and  
9 in some cases hidden files on users' computers that can expose users to malicious attacks by  
10 third parties, all without appropriate notice and consent from purchasers. The CDs also  
11 condition use of the music on unconscionable licensing terms. These, plus other problems  
12 caused by Sony BMG's inclusion of this software, are in violation of California law and public  
13 policy. After a series of embarrassing public revelations about security risks associated with the  
14 XCP software, including warnings issued by the United States Government, Microsoft and  
15 leading anti-virus companies, defendant Sony BMG has taken some steps to respond to the  
16 security risks created by the XCP technology. It has failed, however, to address security concerns  
17 raised by the MediaMax software or the consumer privacy and consumer fairness problems  
18 created by both technologies.

## **JURISDICTION AND VENUE**

20       2.     The jurisdiction of this Court arises under Code of Civil Procedure § 410.10  
21 because Defendants conduct business in and sell a substantial number of audio compact discs in  
22 the State of California. This Court has subject matter jurisdiction over this Class and the  
23 representative action pursuant to Bus. & Prof. Code, § 17200, et seq. (“UCL”); Bus. & Prof.  
24 Code § 17500, et seq.; Civ. Code § 1750, et. seq.; Code of Civil Procedure § 382; and other  
25 provisions of the California Codes.

26           3.       Venue is proper in this County pursuant to Code of Civil Procedure, § 395.5,  
27 Civil Code, § 1780(c), Bus. & Prof. Codes, §§ 17202 and 17203, because Sony BMG conducts  
28 substantial business within this County.

## PARTIES

2           4. At all times mentioned herein, Plaintiff Robert Hull was, and still is, an individual  
3 and resident of Chatsworth, California.

4           5. At all times mentioned herein, Plaintiff Joseph Halpin was, and still is, an  
5 individual and resident of Sebastopol, California.

6           6.       At all times mentioned herein, Plaintiff Edwin Bonner was, and still is, an  
7 individual and resident of La Jolla, California.

8        7.        At all times mentioned herein, Defendant Sony BMG Music Entertainment  
9        ("Sony BMG"), is and at all relevant times was, a Delaware General Partnership, with its  
10        principal place of business in New York, New York. Sony BMG maintains an office in  
11        California.

12        8.      Defendant Sony Corporation of America is the U.S. subsidiary of Sony  
13 Corporation, a multinational corporation based in Japan. At all times mentioned herein,  
14 Defendant Sony Corporation of America, is and at all relevant times was, a New York  
15 corporation, with its principal place of business in New York, New York.

16 9. Defendant Bertelsmann, Inc. is the U.S. subsidiary of Bertelsmann AG, a  
17 multinational corporation based in Germany. At all times mentioned herein, Defendant  
18 Bertelsmann, Inc., is a Delaware Corporation with its principal place of business in New York,  
19 New York.

## FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

21        10.      In August 2004, Sony Corporation merged its Sony Music Entertainment, Inc.  
22 with Bertelsmann AG's BMG to create a joint venture, Sony BMG. Sony Corporation of  
23 America and Bertelsmann AG are the parent companies, respectively, of Sony Music  
24 Entertainment and BMG.

25           11.    Sony BMG is the world's second largest music company. Its labels include Arista  
26 Records, Columbia Records, Epic Records, J Records, Jive Records, LaFace Records, Legacy  
27 Recordings, Provident Music Group, RCA Records, RCA Victor Group, RLG – Nashville,  
28 SONY BMG Masterworks, Sony Music Nashville, Sony Urban Music, Sony Wonder, So So Def

1 Records, and Verity Records. Sony BMG manufactures, distributes, markets, and sells audio  
2 compact discs ("CDs").

3 12. In 2003, Sony BMG began to distribute CDs that contain software that Sony  
4 BMG refers to as Digital Rights Management ("DRM") to the public. This DRM software on  
5 the Sony BMG CDs includes MediaMax created by SunnComm ("MediaMax CDs") and  
6 Extended Copy Protection ("XCP") created by First4Internet ("XCP CDs"). On information and  
7 belief, Sony BMG intended that most of its CDs sold in the United States would incorporate one  
8 of these technologies.

9 13. Sony BMG is the first company to commercially deploy XCP.

10 14. On information and belief, Sony BMG has been using versions of XCP since  
11 2002 on prerelease CDs sent to radio stations and internal employees.

12 15. On information and belief, Sony BMG and BMG have been using MediaMax on  
13 some CDs since at least 2003. On information and belief, Sony BMG currently uses MediaMax  
14 5 on its MediaMax CDs.

15 16. Since March 2005, Sony BMG has distributed at least 52 music titles with XCP  
16 software. On information and belief, Sony BMG has shipped at least 4.7 million CD's  
17 containing the XCP software, of which 2.1 million have been sold.

18 17. Sony BMG has also distributed many more music titles with MediaMax  
19 software—including a number one hit CD last year by Velvet Revolver, entitled *Contraband*.  
20 On information and belief, Sony BMG has distributed at least 20 million CDs with MediaMax  
21 software.

22 18. In a November 11, 2005, MSNBC.com article, by Bob Sullivan, Sunncomm CEO  
23 Peter Jacobs states that MediaMax is "now on about 20 million Sony BMG music discs."

24 **THE SUNNCOMM SOFTWARE IS UNDISCLOSED SPYWARE  
25 AND COMPROMISES SECURITY**

26 19. The Anti-Spyware Coalition ("ASC") describes spyware as technologies deployed  
27 without appropriate user consent and/or implemented in ways that impair user control over:  
28 (1) material changes that affect a user's experience, privacy, or system security; (2) use of the

1 user's system resources, including what programs are installed on the user's computer; and/or  
 2 (3) collection, use, and distribution of a user's personal or other sensitive information. Computer  
 3 Associates defines spyware as "Any product that employs a user's Internet connection in the  
 4 background without their knowledge, and gathers/transmits info on the user or their behavior."  
 5 As discussed below, the MediaMax software used by Sony BMG on many of its CDs meets the  
 6 ASC's definition of spyware.

7       20. MediaMax installs without meaningful consent or notification. When a  
 8 MediaMax CD is inserted into a computer running Windows, MediaMax installs, prior to the  
 9 appearance of the End User License Agreement ("EULA"), approximately eighteen files that  
 10 consume approximately 15 MB on the user's hard drive. These files remain installed even if the  
 11 user declines the EULA presented later. One of them, a kernel-level driver with the cryptic name  
 12 "sbcphid," is both installed and launched. The "kernel" is the core of a computer operating  
 13 system, which controls and secures access to the computer's basic operations.

14       21. This kernel-level driver is the heart of the MediaMax copy protection system.  
 15 When it is running, it attempts to block CD ripping and copying applications from reading the  
 16 audio tracks on MediaMax CDs. The software refrains from making one final change until after  
 17 users accept the license—it does not set the driver to automatically run again every time  
 18 Windows starts. Nevertheless, the code keeps running until the computer is restarted and  
 19 remains on the hard disk indefinitely, even if the agreement is declined.

20       22. Only after these files are installed and at least one has launched does the software  
 21 display a EULA, which the user may accept or decline, making it a contract of adhesion. Even if  
 22 the EULA is declined, however, the software already installed prior to presentation of the EULA  
 23 remains on the user's computer.

24       23. The MediaMax CDs' EULA states: "As soon as you have agreed to be bound by  
 25 the terms and conditions of the EULA, this CD will automatically install a small proprietary  
 26 software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is  
 27 intended to protect the audio files embodied on the CD, and it may also facilitate your use of the  
 28 DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER

1 until removed or deleted.” This statement is not true, since by the time this message is displayed,  
2 over eighteen files are already installed and, as noted above, those files remain on the hard disk  
3 indefinitely, even if the agreement is declined. Attached hereto as Exhibit A and incorporated  
4 herein by reference is a true and correct copy of the MediaMax EULA.

5 24. Sony BMG’s MediaMax CD EULA states that “[T]he SOFTWARE will not be  
6 used at any time to collect any personal information from you, whether stored on YOUR  
7 COMPUTER or otherwise.”

8 25. If purchasers seek more information about the software that has been installed on  
9 their computer, they are directed to the SunnComm Sony BMG customer care website, which  
10 falsely tells users that “No information is ever collected about you or your computer without you  
11 consenting” and also states: “Is any personal information collected from my computer during the  
12 digital key delivery process? No, during the digital key delivery process, no information is ever  
13 collected about you or your computer.”

14 26. Despite the representations to the contrary in the EULA and the SunnComm  
15 website, and without notification or consent of the user, the MediaMax software “phones home”  
16 to SunnComm every time a user plays a protected CD. The software causes the computer to  
17 connect to a Sony BMG and/or SunnComm server via the internet. The MediaMax software  
18 conveys a unique code that identifies the album to which the user is listening. The request also  
19 contains standard HTTP headers from which can be used to determine what operating system the  
20 user is running and what version of the Internet Explorer web browser the user has.

21 27. On information and belief, prior versions of the MediaMax software still used on  
22 some Sony BMG CDs contact Sony BMG and/or SunnComm to obtain “digital keys” that  
23 permitted the CDs to be copied.

24 28. The SunnComm Sony BMG customer care website also does not have a visible  
25 privacy policy.

26 29. The Media Max software connects to an online service at  
27 <http://license.sunncomm2.com/>, which does not have a visible privacy policy.

28 30. The MediaMax software opens a web page from a Sony BMG and/or SunnComm  
29 CLASS ACTION COMPLAINT

1 server and sends a 32-character identifier through an HTTP request. On information and belief,  
2 this is a unique code that tells Sony BMG and/or SunnComm to which album the user is  
3 listening. The request also contains standard HTTP headers that can be used to determine the  
4 user's operating system.

5       31.    The server to which the MediaMax software connects returns an HTTP response  
6 to the MediaMax software. On information and belief, this response is intended to facilitate the  
7 placement of dynamic, interactive advertisements that can be changed at any time by Sony BMG  
8 and/or SunnComm.

9       32.    The MediaMax software also transmits the user's computer's Internet Protocol or  
10 "IP" address to servers controlled by Sony BMG or its agents, without receiving permission from  
11 the computer user. No two IP addresses are alike and IP addresses provide the means to  
12 determine information about the person who used the particular IP address. Users are assigned  
13 an IP address by their Internet service provider or system administrator. Many users are issued  
14 frequently changing "dynamic" IP addresses that make it difficult to track them individually, but  
15 others have fixed, "static" addresses that can permit Sony BMG to ascertain their identities and  
16 associate listening habits with particular individuals across many different CDs containing the  
17 Sunncomm software.

18       33.    The Sunncomm MediaMax support website  
19 (<http://tickets.sunncomm.com/selfhelp/>), also misleadingly states, "Please note that MediaMax  
20 was designed to manage and safeguard the copyrights of specified artists' CDs while giving you  
21 an enhanced visual and listening experience. It does not interfere with or impact any of the  
22 normal operations and/or functions of your computer." (emphasis in the original). As described  
23 above, this statement is false.

24       34.    Sony BMG fails to disclose, prior to purchase, that users running the MediaMax  
25 CDs on Windows-based computers could have filed downloaded and stored on their computers  
26 without their consent, and failed to disclose that the software would transmit information about  
27 user, including monitoring whenever users listen to the CDs, without notification to or consent of  
28 the users.

1                   **SUNNCOMM'S MEDIAMAX UNINSTALLER CREATED A GREATER SECURITY**  
2                   **RISK AND VIOLATED USER'S PRIVACY**

3               35.    On information and belief, none of the MediaMax CDs from Sony BMG contains  
4    an uninstaller.

5               36.    Upon request, SunnComm will provide an internet-based uninstaller for the  
6    MediaMax software. On information and belief, SunnComm provides this uninstaller only after  
7    repeated requests that require the disclosure of personally identifying information.

8               37.    The uninstaller suffers from a design flaw. When a user visits the SunnComm  
9    uninstaller web page, the user is prompted to accept a small software component—an ActiveX  
10   control called "AxWebRemoveCtrl" created by SunnComm.

11               38.    This ActiveX control is designed so that any web page can ask it to download and  
12    executing code from an arbitrary website location or URL.

13               39.    If a user visits a malicious website, the site can use the flawed ActiveX control to  
14    download, install, and run malicious or dangerous software code on the user's computer without  
15    the user's knowledge or consent. Such code could severely damage a user's computer, including  
16    but not limited to erasing a user's hard disk.

17               40.    The uninstaller fails to remove the vulnerable ActiveX control from the user's  
18    computer following completion of the uninstallation process.

19               41.    Sony BMG fails to disclose the security risks created by the MediaMax software  
20    and the MediaMax uninstaller, and their potential harm to a user's computer.

21               42.    Therefore, users who hope to prevent and/or limit security and privacy risks must  
22    rely on the research and publication efforts of independent security experts and consumer  
23    advocates.

24               43.    On information and belief, the MediaMax software causes additional damage to  
25    users' computers.

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# **THE XCP SOFTWARE IS UNDISCLOSED SPYWARE AND COMPROMISES SECURITY**

44. Sony BMG's actions and omissions with respect to the MediaMax software are part of a pattern of corporate failure to investigate, address, and disclose the security and privacy risks associated with its inclusion of so-called DRM software on music CDs.

7        45.    Similar and, in some respects, more serious risks have been identified in CDs  
8 loaded with another Sony BMG technology, Extended Copy Protection, or XCP. As with the  
9 MediaMax software, these risks have been disclosed by independent researchers and consumer  
10 advocates, rather than Sony BMG.

11        46. The software on a Sony BMG XCP CD is designed to operate only on Windows-  
12 based computers that run Windows 98SE/NT/2000/XP.

13       47. When a computer user places the Sony BMG XCP CD in a Windows based  
14 computer, the software is designed such that the user is first required to agree to a EULA.  
15 According to the EULA, a user cannot utilize the audio files or the digital content of the CD on  
16 the computer unless the user agrees to the EULA making it a contract of adhesion. Attached  
17 hereto as Exhibit B and incorporated herein by reference is a true and correct copy of the XCP  
18 EULA.

19 48. The user is then told that the XCP software automatically installs player software  
20 into the user's computer that will allow the user to play, save and copy the audio files on the CD.

21        49. According to the EULA, the software automatically installed by the XCP CD is  
22 intended to protect the “digital content” embodied on the XCP CD. Digital content appears to  
23 include audio files converted into digital music files as well as unspecified other “already  
24 existing digital content.”

25        50. While the user is led to believe that Sony BMG's XCP software is installing the  
26 player software into the user's computer, it is actually installing software as a "rootkit" into the  
27 user's hard drive. The Sony BMG XCP software also installs a CD drive filter driver that  
28 intercepts calls to the computer's CD drive.

1       51.    A rootkit is used to hide login, processes, files, and logs and may include software  
 2 to intercept data from terminals, network connections, CD drives, and keyboards. A rootkit is  
 3 invisible to the operating system and antivirus and security software, and is frequently used by  
 4 unauthorized third-parties, after gaining access to a computer system, to hide their activities.

5       52.    Specifically, the Sony BMG rootkit is a system filter driver which intercepts all  
 6 calls for process, directory or registry listings, and then modifies what information is visible to  
 7 the operating system in order to hide every file, process, or registry key beginning with the  
 8 characters “\$sys\$.”

9       53.    Unbeknownst to users, once the rootkit is installed by the software on a Sony  
 10 BMG CD, the rootkit degrades the performance of the user’s computer.

11       54.    In a November 1, 2005, *eweek.com* article by Paul Roberts, computer security  
 12 analyst Mark Russinovich states that the rootkit files interact with the Windows operating system  
 13 at a very low level and fail to account for certain conditions that could cause the files to  
 14 overwrite areas of memory, crashing applications that use that memory, or even crashing the  
 15 entire Windows operating system. On information and belief, this article correctly illustrates  
 16 some of the damage the rootkit could do.

17       55.    The rootkit causes significant and cumulative injury to a user’s computer.  
 18 Specifically, the rootkit can interfere with the computer’s CD drive, file copying software, and  
 19 media players. The rootkit also uses up system memory that would otherwise be available.

20       56.    On or around November 4, 2005, on National Public Radio’s “Morning Edition”  
 21 program, Thomas Hesse, President of Sony BMG’s global digital business division, when asked  
 22 about the XCP controversy, responded “Most people, I think, don’t even know what a rootkit is,  
 23 so why should they care about it?” In the same program, Mr. Hesse also denied that Sony  
 24 BMG’s software communicated with Sony BMG, saying “No information ever gets gathered  
 25 about the users’ behavior, no information ever gets communicated back to the user, this is purely  
 26 about restricting the ability to burn MP3 files in an unprotected manner.”

27       57.    Sony BMG failed to disclose that the XCP software, in the rootkit, automatically  
 28 connects the user’s computer via the internet to a server owned or operated by Sony BMG or its

1 affiliates, without the user's consent. Once a user's computer is connected to the Sony BMG  
 2 website, the software sends an identification code associated with each XCP CD that is played on  
 3 that computer to the Sony BMG website. The Sony BMG server then automatically checks for  
 4 updates to the album art and lyrics for that album. This process uses the bandwidth that would  
 5 otherwise be available to the user's computer for other tasks.

6       58. As with the MediaMax software, this network connection provides Sony BMG  
 7 with the ability to record each time a CD with XCP software is played and the IP address of the  
 8 computer playing it, without receiving permission from the computer user. As discussed above,  
 9 no two IP addresses are alike and IP addresses provide the means to determine information about  
 10 the person who used the particular IP address. Sony BMG does not disclose the possibility of  
 11 this use of DRM software in its packaging, the installation process, or its EULA. Instead the  
 12 EULA states, "the SOFTWARE will not be used at any time to collect any personal information  
 13 from you, whether stored on YOUR COMPUTER or otherwise."

14       59. The Anti-Spyware Coalition and computer security firm Computer Associates  
 15 identify Sony BMG's XCP software as "Spyware."

16       60. Sony BMG's XCP software meets the ASC standards for spyware because the  
 17 rootkit is placed on the computer without the user's consent and it changes the user's system  
 18 security because the rootkit makes the user's computer more vulnerable to other types of  
 19 malware.

20       61. Computer Associates has classified the Sony BMG XCP rootkit as a form of  
 21 spyware known as a "Trojan," noting that the "XCP.Sony.Rootkit modifies you[r] operating  
 22 system at a low level, represents a large threat to both corporate and consumer users system  
 23 integrity." Computer Associates also has noted that "[t]he Rootkit functionality hides files and  
 24 enables hackers and other spyware to hide files with impunity."

25       62. Computer Associates has categorized Sony BMG's "Media Player" as spyware,  
 26 noting that "When launched from the CD, Music Player sends information back to Sony BMG,  
 27 indicating which album is being played."

28       63. Once the rootkit is on a user's computer, it creates an undisclosed risk of security

1 breach to that computer because other malicious software, such as computer viruses, worms, and  
2 spyware that enter the computer could exploit the software concealed by the rootkit.

3       64.    Malicious software coders have discovered that they can effectively render their  
4 programs invisible by using names for computer files similar to ones cloaked by the Sony BMG  
5 technology. On information and belief, several malicious programs that exploit the XCP  
6 technology's ability to avoid detection have already been distributed over the internet. Further,  
7 as stated above, XCP software transmits information about the user's computer, IP address, and  
8 listening habits.

9       65.    On or around November 12, 2005, Microsoft, Inc., the maker of the Windows  
10 operating system stated that "Rootkits have a clearly negative impact on not only the security,  
11 but also the reliability and performance of their systems" and Microsoft's Anti-Malware  
12 Engineering Team informed consumers that "in order to help protect our customers we will add a  
13 detection and removal signature for the rootkit component of the XCP software."

14       66.    The nature of a rootkit makes it extremely difficult for a computer user to remove,  
15 often leaving reformatting the entire hard drive as the only solution. Reformatting a hard drive  
16 requires backing up all data on the hard drive, as reformatting a hard drive deletes all data on the  
17 hard drive. The user is then required to re-install the operating system and all applicable  
18 programs and drivers. This process can take many hours and is beyond the technical capabilities  
19 of many users. Sony BMG's XCP CD EULA and install process do not disclose nor does the  
20 CDs' software prompt users with information about the rootkit or the need to reformat the hard  
21 drive in order to remove it.

22       67.    In response to the public outcry about the deceptive nature of Sony BMG XCP  
23 CDs, Sony BMG made available a software patch. The patch was only available on the Sony  
24 BMG support site (<http://cp.sonybmg.com/xcp/english/home.html>). The patch does not remove  
25 the software or allow the user to remove the software. The software patch merely makes the  
26 software visible to system tools and antivirus software while installing an additional 3.5 MB of  
27 updated versions of the software into the user's computer. Additionally, the patch contains a  
28 design flaw that could cause a computer to crash as it is installed.

1       68.     Sony BMG failed to disclose that if a user attempts to disable the software it will  
2 likely disable the audio CD driver on the computer, rendering the user's CD drive inoperable. If  
3 the rootkit is removed manually, the Sony BMG software's changes to the user's system will  
4 render the user's CD drive non-functional. According to computer security firm Computer  
5 Associates, "[r]econfiguring the CD-ROM driver to a functioning state will be beyond the ability  
6 of the average home user."

7        69. Computer Associates categorized Sony BMG's patch as a "Trojan" and noted that  
8 the Sony BMG software, even when patched with Sony BMG's update, continues to "represent a  
9 threat to the user's control over their system . . ."

10        70. The United States Computer Emergency Readiness Team (US-CERT), part of the  
11 Department of Homeland Security that is charged with the task of "protecting the nation's  
12 Internet infrastructure" by coordinating "defense against and responses to cyber attacks across  
13 the nation" has stated that the XCP rootkit "can pose a security threat" and that "one of the  
14 uninstallation options provided by Sony BMG also introduces vulnerabilities to a system."

71. Installation of a rootkit on a computer undermines the security of that computer.

16        72. Installation of a rootkit on a computer causes impairment to the integrity or  
17 availability of data, a program, a system or information.

18       73. The software installed by Sony BMG includes a set of computer instructions that  
19 are designed to modify, damage, destroy, record, and/or transmit information within a computer,  
20 computer system, or computer network without the intent or permission of the owner of the  
21 information.

22 74. On information and belief, the XCP software causes additional damage to users'  
23 computers.

## **SONY BMG'S FIRST XCP UNINSTALLER CREATED A GREATER SECURITY RISK AND VIOLATED USER'S PRIVACY**

26 75. On information and belief, the only way for typical users to safely uninstall the  
27 software is to obtain an uninstaller from Sony BMG. Until approximately November 15, 2005,

1 in order to obtain an uninstaller from Sony BMG, a user was required to navigate an extensive  
 2 request process and disclose more personal information to Sony BMG. First, the user was  
 3 required to go to the Sony BMG support website and fill out a form stating: a country where the  
 4 CD was purchased; the artist's name; the album title; the store name; and the user's e-mail  
 5 address. After submitting the form, the user was directed to a website which states that the user  
 6 that the user will receive an e-mail with a "Case ID." Next, the user received an e-mail that  
 7 directed the user to install the patch and then visit another website if the user still wanted to  
 8 uninstall the DRM software.

9       76.     This further website, available until November 15, 2005, required the user to  
 10 install ActiveX control software. The user was then required to enter the Case ID and fill in the  
 11 reasons for the request. Once the user submitted this information, the user receives an email that  
 12 notifies the user that a customer service representative would email the uninstall instructions to  
 13 the user within a business day. The user then received an e-mail with a link to a confidentiality  
 14 notice, which had to be accepted before software could be uninstalled.

15       77.     Sony BMG states that the information collected by Sony BMG before providing  
 16 the uninstaller is subject to its Privacy Policy, <http://www.sonybmg.com/privacypolicy.html>.  
 17 The Sony BMG Privacy Policy states, *inter alia*, that Sony BMG "may share the information we  
 18 collect from you with our affiliates or send you e-mail promotions and special offers from  
 19 reputable third parties in whose products and services we think you may have an interest. We  
 20 may also share your information with reputable third-parties who may contact you directly."

21       78.     On information and belief, if the Sony BMG software was uninstalled using the  
 22 uninstaller available until November 15, 2005, the user was no longer able to receive the full use  
 23 and value of the XCP CD on his or her computer. Therefore, Sony BMG required the user to  
 24 either accept the malicious software or lose the full use and value of the XCP CD. Sony BMG  
 25 did not disclose this fact to users prior to purchase.

26       79.     The Sony BMG software could not be uninstalled if the user proceeded to the  
 27 link from a different computer than the one on which the user installed the ActiveX control  
 28 software. If the user is not at that same computer he or she will receive an error message. The

1      uninstall link contains the Case ID in the address, so when the user proceeds to the uninstall link,  
2      the ActiveX control software sends the sends a Sony BMG website an encrypted block of data.  
3      This encrypted data is a signature that is tied to the hardware configuration of the user's  
4      computer.

5            80.     On information and belief, the ActiveX uninstaller leaves behind numerous  
6      software methods that can be exploited by others.

7            81.     The ActiveX uninstaller also exposes a user's computer to additional risks by  
8      enabling malicious third parties to download and install over the internet because but the  
9      ActiveX uninstaller fails to restrict such access only to Sony BMG or First4Internet. Such  
10     malicious code could severely damage a user's computer, including but not limited to erasing a  
11     user's hard disk.

12           82.     Sony BMG does not cause the ActiveX control to be removed from user's  
13      computers following completion of the installation process.

14           83.     On information and belief, the uninstallation can cause further damage to users'  
15      computers, including but not limited to, causing a user's Windows operating system to crash.

16           84.     On or around November 15, 2005, Sony BMG posted the following message on  
17      its website: "We currently are working on a new tool to uninstall First4Internet XCP software.  
18      In the meantime, we have temporarily suspended distribution of the existing uninstall tool for  
19      this software. We encourage you to return to this site over the next few days. Thank you for your  
20      patience and understanding." Sony BMG failed to disclose the problems associated with the old  
21      uninstaller. As of the filing of this complaint, no new uninstaller has been made available.

22           85.     On information and belief, the software released by Sony BMG to resolve the  
23      flaws in the XCP software can cause further damage to users' computers.

24           **SONY BMG HAS MADE MATERIAL MISREPRESENTATIONS AND  
25      OMISSIONS REGARDING THE SOFTWARE IT HAS INCLUDED ON MUSIC CDS**

26           86.     In addition to the material misrepresentations and omissions set forth above, Sony  
27      BMG has made numerous additional misrepresentations and omissions of material facts.

28           87.     On information and belief, the XCP and MediaMax CDs are disseminated with

1 identical EULAs.

2       88.    Sony BMG's EULAs state that the MediaMax and XCP software installed on a  
 3 user's computer will not be used to collect any personal information. As set forth above, this is  
 4 untrue.

5       89.    Sony BMG's EULAs state that the MediaMax and XCP software will remain on  
 6 the user's computer until it is removed or deleted. Neither the MediaMax nor the XCP software  
 7 allows a user to use the standard "add/remove program" function on the Windows operating  
 8 system to remove the program. Sony BMG's MediaMax and XCP CDs and its software fail to  
 9 provide information about how to remove the program or even how to contact Sony BMG to  
 10 resolve any problems with the program.

11       90.    The EULAs disclose that the MediaMax and XCP drivers try to "protect the audio  
 12 files embodied on the CD." However, the drivers also attempt to restrict access to any other CD  
 13 that uses MediaMax or XCP technology. Therefore, users need only agree to installation on one  
 14 album for the software to affect users' ability to use many other titles.

15       91.    Sony BMG uses its website to advertise and promote the sale of its CDs. On its  
 16 website, until November 15, 2005, Sony BMG falsely denied that its software is spyware and  
 17 that it posed a security risk. Sony BMG also made the false claim that the software does not  
 18 collect any personal information nor is it designed to be intrusive to the user's computer system.

19       92.    On or around November 8, 2005, Sony BMG publicly and falsely stated, on the  
 20 <http://cp.sonybmg.com/xcp> website, that the XCP software's rootkit "component is not malicious  
 21 and does not compromise security."

22       93.    The above website directs users to another site, <http://updates.xcp-aurora.com/>,  
 23 where users can obtain a software update to remove the rootkit component of the XCP  
 24 technology. As of the filing of this complaint, the website states that the cloaking component "is  
 25 not malicious and does not compromise security."

26       94.    On its support website (<http://cp.sonybmg.com/xcp/english/home.html>), Sony  
 27 BMG stated, until approximately November 16, 2005, that its XCP software simply acts to  
 28 prevent unlimited copying and ripping from discs featuring the technology. Sony BMG created

1 the false impression that the only effect of software included on CDs would be to restrict the  
 2 ability to create copies of CDs or the quantity of CDs that a user can copy.

3 95. On or around November 16, 2005, Sony BMG announced, on the  
 4 <http://cp.sonybmg.com/xcp> website, that it shared the security concerns of consumers regarding  
 5 the XCP discs, and offered to exchange new CDs for CDs with XCP software. Sony BMG did  
 6 not indicate the nature or extent of the security risks associated with the XCP software. Sony  
 7 BMG also affirmed that the XCP software was not a “monitoring technology.”

8 96. Sony BMG uses its website to advertise and promote the sale of its CDs. On its  
 9 website, until November 15, 2005, Sony BMG falsely denied that its software is spyware and  
 10 that it posed a security risk. Sony BMG also made the false claim that the software does not  
 11 collect any personal information nor is it designed to be intrusive to the user’s computer system.  
 12 Sony BMG has failed to make efforts to publicize the flaws in its XCP software and uninstaller,  
 13 apart from statements on its websites and statements to the press. Therefore, many XCP CD  
 14 purchasers are unaware of the security and other risks caused by the software.

15 97. Sony BMG has failed to publicly disclose or address the risks associated with  
 16 MediaMax software and its uninstaller. Therefore, many MediaMax CD purchasers are unaware  
 17 of the security and other risks caused by the software.

18 98. As set forth above, the MediaMax CD EULA and the SunnComm Sony BMG  
 19 support website misleadingly represent that the software will not be used to collect personal  
 20 information about the user without his or her permission.

21 99. As set forth above, the MediaMax CD EULA and the SunnComm Sony BMG  
 22 support website falsely represent that MediaMax software will not be installed if the user  
 23 declines the EULA.

24 100. The MediaMax EULA fails to disclose other important details about what the  
 25 uninstaller does, including but not limited to the security risks it poses to users’ computers.

26 101. According to Sony BMG, the purpose of the software is to restrict the ability to  
 27 create copies of CDs or the quantity of CDs that a user can copy. The MediaMax and XCP  
 28 software goes far beyond copyright protection, however. For example, the software makes it

1 extremely difficult for a consumer with a PC to transfer their music to an Apple Corporation-  
 2 manufactured iPod but easy to transfer to other portable digital music players, such as those sold  
 3 by Sony. Sony BMG asks iPod owners who have XCP CDs to complain to Apple about the  
 4 inability to play Sony BMG protected music on an iPod. The MediaMax support website also  
 5 asks iPod owners who have MediaMax CDs to complain to Apple about the inability to play  
 6 Sony BMG protected music on an iPod. To the extent that this is intended to advantage Sony  
 7 BMG or its partners in the portable digital music player market, this advantage comes at the  
 8 expense of consumers.

9 **SONY BMG'S EULAS CONTAIN NUMEROUS UNCONSCIONABLE AND  
 10 UNREASONABLE PROVISIONS**

11 102. Plaintiffs incorporate the allegations set forth above by references, as if set forth  
 12 fully herein.

13 103. On information and belief, the XCP and MediaMax CDs are disseminated with  
 14 identical EULAs.

15 104. Sony BMG has inserted several unconscionable provisions EULA that  
 16 accompanies the XCP and MediaMax CDs. These provisions include:

- 17 a. Restrictions on the user's ability to use the digital content on the CD in the  
 18 event that that consumer chose to leave the United States;
- 19 b. Restrictions on resale and transfer of the digital content on the CDs;
- 20 c. Restrictions on user's ability to use the digital content on the CDs at work;
- 21 d. Restrictions on user's ability to use and retain lawfully-made copies of the  
 22 digital content on the CDs in the event that the original CD is stolen or lost;
- 23 e. Restrictions on user's ability to use the digital content on the CDs following a  
 24 bankruptcy;
- 25 f. Conditioning the user's continued use of the digital content on the CDs on  
 26 acceptance of all Sony BMG software updates;
- 27 g. A purported \$5.00 limit on Sony BMG's entire liability to the purchaser of the  
 28 CDs;

- 1 h. Restrictions on user's ability to examine and test his or her computer to
- 2 understand and attempt to prevent the damage cause by the rootkit;
- 3 i. A reservation of rights by Sony BMG to use "technological "self-help"
- 4 measures against the computers of users who desire to make use of the digital
- 5 content on the CDs "at any time, without notice to [the user]."
- 6 j. Restrictions on the user's ability to seek redress in California courts, under
- 7 California law, and the purchaser's ability to seek a trial by jury;
- 8 k. A disclaimer of all warranties, including implied warranties of
- 9 merchantability, satisfactory quality, noninfringement, and fitness for any
- 10 particular purpose.

SONY BMG'S SOFTWARE IS A COMPUTER CONTAMINANT

12        105. Sony BMG has introduced a computer contaminant, in violation of California  
13 Penal Code Section 502, into the Plaintiffs' and the Class' computers, computer systems or  
14 computer networks.

15        106. Sony BMG software includes a set of computer instructions that are designed to  
16 modify, damage, destroy, record, or transmit information within a computer, computer system, or  
17 computer network.

18 107. Sony BMG software transmits information about which CDs the user is playing  
19 through the Internet.

20        108. Sony BMG knowingly introduced the software into a computer, computer system,  
21 or computer network.

22 109. The Plaintiffs and the Class do not intend for the Sony BMG software to transmit  
23 information about which CDs the user is playing through the Internet.

24 110. The Plaintiffs and the Class did not give permission for the Sony BMG software  
25 to transmit information about which CDs the user is playing through the Internet.

26 111. Sony BMG has intentionally accessed a computer without authorization or  
27 exceeded authorized access, and thereby obtained information from computers owned by  
28 Plaintiffs and the Class; and accessed such computers without authorization, and as a result of

1 such conduct, recklessly caused damage.

2       112. Sony BMG knowingly caused the transmission of a program, information, code,  
3 or command, and as a result of such conduct, intentionally caused damage without authorization,  
4 to computers owned by Plaintiffs and the Class.

5       113. Sony BMG intentionally accessed computers owned by Plaintiffs and the Class  
6 without authorization.

7       114. Sony BMG knowingly and with intent to defraud, accessed computers owned by  
8 Plaintiffs and the Class without authorization, or exceeded authorized access. Sony BMG's  
9 conduct furthered the fraud and allowed Sony BMG to obtain information of value.

10      115. By engaging in the above-described acts, Sony BMG knowingly, intentionally  
11 and/or recklessly caused damage.

12      116. By engaging in the above-described acts, Sony BMG caused damage.

13      117. By engaging the above described acts, Sony BMG has caused or attempted to  
14 cause a threat to public health or safety,

15      118. It is important to public safety not to defeat or undermine the security measures  
16 on computers.

17      119. Keeping the Internet infrastructure functioning is important to public safety.

18      **SONY BMG HAS CAUSED DAMAGE TO CONSUMERS AND THE PUBLIC**

19      120. On or around November 16, 2005, Sony BMG issued a public statement  
20 announcing that it would recall XCP CDs and allow customers to exchange the XCP CDs for  
21 CDs that would not contain any DRM.

22      121. As of the filing of this Complaint, Sony BMG has not offered to refund the  
23 purchase price of the XCP CDs.

24      122. As of the filing of this complaint, Sony BMG has not offered to recall, replace, or  
25 refund the purchase price of MediaMax CDs.

26      123. As of the filing of this complaint, Sony BMG has not compensated or offered to  
27 compensate consumers for the damage it has caused to their computers.

28      124. Through the actions set forth above, Sony BMG has damaged its customers,

1 including Plaintiffs and Class members, to an extent to be determined at trial, caused them actual  
2 injury, and caused them to lose money and property.

3 125. Investigation into the scope and extent of the effects and damage caused by Sony  
4 BMG's software is ongoing. Plaintiffs, on behalf of themselves and the Class, reserve the right  
5 to amend these allegations as new information is discovered.

6 **CLASS ACTION ALLEGATIONS**

7 126. Plaintiffs bring this action on behalf of themselves and all others similarly  
8 situated, in both a representative capacity and as a class action pursuant to California Code of  
9 Civil Procedure section 382 and California Civil Code section 1781. Plaintiffs seek to represent  
10 the following class:

11 All California residents who purchased an audio compact disc distributed by Sony  
12 BMG, which contains XCP or MediaMax software.

13 Not included within the class definition are Defendants and its affiliates. Additionally, solely for  
14 the purposes of the Consumer Legal Remedies Act, California Civil Code Section 1750, *et seq.*,  
15 the class does not include business entities. In the alternative, to the grounds for class  
16 certification set forth below, Plaintiffs may seek an injunctive relief class based on the fact that  
17 Sony BMG has acted or refused to act on grounds generally applicable to the class and California  
18 consumers, thereby making appropriate final injunctive relief and declaratory relief with respect  
19 to the Class and California consumers as a whole.

20 127. This action has been brought and may properly be maintained as a class action,  
21 pursuant to the provisions of the California Code of Civil Procedure Section 382 and California  
22 Civil Code Section 1781.

23 128. Numerosity of the Class - - Code Civ. Proc., § 382; Civ. Code, § 1781 (b)(1):  
24 Members of the Class are so numerous that their individual joinder is impracticable. The precise  
25 numbers of members of the Class and their addresses are unknown to the Plaintiffs. Plaintiffs  
26 estimate the Class to consist of hundreds of thousands of members. The precise number of  
27 persons in the Class and their identities and addresses may be ascertained from Defendants'  
28 records. Members of the Class may be notified of the pendency of this action by mail,

1       supplemented (if deemed necessary or appropriate by the Court) by published notice.

2           129. Existence and Predominance of Common Questions of Fact and Law - - Code  
3 Civ. Proc. § 382; Civ. Code, § 1781(b)(2): Common questions of law and fact exist as to all  
4 members of the Class. These questions predominate over the questions affecting only individual  
5 members of the Class. These common legal and factual questions include whether:

- 6           a.       Sony BMG cngaged in deceptive business practice in connection with the sale and  
7                   advertising of the XCP and MediaMax CDs;
- 8           b.       Sony BMG, directly or by implication, advertises or represents that the XCP and  
9                   MediaMax CDs have characteristics they do not have;
- 10           c.       Whether Sony BMG attempts to cause consumers to waive provisions of the  
11                   CLRA in violation of the express terms of the statute;
- 12           d.       Whether some or all of the terms of the EULA are unconscionable;
- 13           e.       Whether the MediaMax software installs on consumcers' computers without  
14                   authorization;
- 15           f.       Whether the MediaMax and XCP software exceed the authorizations given by  
16                   consumers;
- 17           g.       Whether the communications by the MediaMax and XCP software over the  
18                   internet are disclosed and necessary uses of the copy protection software.

19           130. Typicality - - Code Civ. Proc., § 382; Civ. Code § 1781(b)(3): Plaintiffs' claims  
20 are typical of the claims of the members of the Class because Plaintiffs purchased a CD  
21 distributed by Defendants, and Plaintiffs were required to agree to the EULA, which did notify  
22 Plaintiffs of the true nature of the software that the CD was to install on Plaintiffs' computer.

23           131. Adequacy - - Code Civ. Proc., § 382; Civ. Code § 1781(b)(4): Plaintiffs are  
24 adequate representatives of the Class because their interests do not conflict with the interests of  
25 the members of the Class they seek to represent. Plaintiffs have retained counsel competent and  
26 experienced in complex class action litigation and Plaintiffs intend to prosecute this action  
27 vigorously. The interests of members of the Class will be fairly and adequately protected by  
28 Plaintiffs and their counsel.

132. Superiority - - Code Civ. Proc., § 382: A class action is superior to other  
1 available means for the fair and efficient adjudication of the claims of Plaintiffs and members of  
2 the Class. The damages suffered by each individual Class member may be relatively small,  
3 especially given the burden and expense of individual prosecution of the complex and extensive  
4 litigation necessitated by Defendants' conduct. Furthermore, it would be virtually impossible for  
5 the Class members, on an individual basis, to obtain effective redress for the wrongs done to  
6 them. Moreover, even if Class members themselves could afford such individual litigation, the  
7 court system could not. Individualized litigation presents a potential for inconsistent or  
8 contradictory judgments. Individualized litigation increases the delay and expense to all parties  
9 and the court system presented by the complex legal issues of the case. By contrast, the class  
10 action device presents far fewer management difficulties, and provides the benefits of a single  
11 adjudication, economy of scale, and comprehensive supervision by a single court.  
12

## FIRST CLAIM FOR RELIEF

### **(Violation of Consumer Legal Remedies Act)**

15           133. Plaintiffs incorporate the allegations set forth above by references, as if set forth  
16 fully herein.

17 134. The Consumer Legal Remedies Act (CLRA), California Civil Code sections 1750  
18 *et seq*, applies to Sony BMG's actions and conduct because such actions and conduct pertain to  
19 transactions that were intended to result and/or resulted in the sale or lease of goods or services  
20 to consumers.

21 135. Plaintiffs and each member of the class are “consumers” within the meaning of  
22 Civil Code Section 1761(d).

23       136. The Sony BMG products that are the subject of this litigation are “goods” within  
24 the meaning of Civil Code section 1761(a).

25        137. Sony BMG has engaged in deceptive practices, unlawful methods of competition  
26 and/or unfair acts as defined by Civ. Code §1770, to the detriment of Plaintiffs and the Class.  
27 Plaintiffs and members of the Class have suffered harm as a proximate result of the violations of  
28 law and wrongful conduct of Defendant alleged herein.

1       138. Sony BMG intentionally and unlawfully perpetrated harm upon Plaintiffs and the  
2 Class by the above described acts.

3       139. In violation of Civil Code section 1770(5), Sony BMG has represented that its  
4 CDs have characteristics, uses or benefits which they do not have.

5       140. In violation of Civil Code section 1770(a)(9), Sony BMG has advertised its CDs  
6 with intent not to sell them as advertised.

7       141. In violation of Civil Code section 1770(a)(14), Sony BMG has represented that  
8 the purchase and/or use of its XCP and MediaMax CDs confers or involves rights, remedies, or  
9 obligations which it does not have or involve, or which are prohibited by law.

10       142. In violation of Civil Code section 1770(a)(19), Sony BMG has inserted several  
11 unconscionable provisions into the end-user license agreement (EULA) that accompanies the  
12 XCP and MediaMax CDs.

13       143. Sony BMG concealed material information regarding the XCP and MediaMax  
14 CDs from Plaintiffs and other class members, including but not limited to the existence of the  
15 rootkit program and its effects on users' computers and the lack of a reasonable way to uninstall  
16 the software in the event of security or privacy violations.

17       144. Users, including Plaintiffs and class members, routinely rely on this type of  
18 information in making music purchase decisions. Had Sony BMG disclosed this material  
19 information, Plaintiffs and other class members would not have purchased the XCP and  
20 MediaMax CDs.

21       145. Plaintiffs and other class members relied on this material information to their  
22 detriment.

23       146. Sony BMG's deceptive acts and omissions and unfair business practices occurred  
24 in the course of selling a consumer product and violate Civil Code section 1770(a).

25       147. As a direct and proximate result of Sony BMG's violations of the CLRA,  
26 Plaintiffs and other class members have suffered harm.

27       148. Sony BMG's policies and practices are unlawful, unethical, oppressive, fraudulent  
28 and malicious. The gravity of the harm to all consumers from Sony BMG's policies and

1 practices far outweighs any purported utility those policies and practices have.

2 149. Pursuant to Civil Code section 1780(a), Plaintiffs seek an order enjoining  
3 Defendant from engaging in the methods, acts or practices alleged herein, including an order  
4 enjoining the defendant from continuing to sell and market XCP and MediaMax CDs and  
5 continuing to disclaim the risks of using such CDs.

6       150. Pursuant to Civil Code section 1782, on November 14, 2005, Plaintiffs notified  
7 Sony BMG of its commission of unlawful acts under Civil Code section 1770, specifying the  
8 particular violations, and demanded that Sony BMG rectify its illegal acts within 30 days. The  
9 demand letter requested that Sony BMG compensate consumers for computer problems related  
10 to the XCP and MediaMax software.

11        151. On November 18, 2005, Sony BMG responded. In its response, Sony BMG did  
12 not agree to provide compensation or to discuss a process for assessing claims. Therefore,  
13 Plaintiffs and the Class also request (a) actual damages; (b) restitution of moncy to Plaintiffs and  
14 Class members; (c) punitive damages; (d) attorneys' fees and costs; and (e) other relief that this  
15 Court deems proper.

**SECOND CLAIM FOR RELIEF**

(Violation of California Business and Professions Code Section 17200)

19 152. Plaintiffs incorporate the allegations set forth above by references, as if set forth  
20 fully herein.

153. Plaintiffs and the Class have suffered injury in fact and lost money or property as  
a result of such unfair competition. Such injuries and losses include, but are not limited to,  
computer damage, time and effort spent identifying and attempting to remove the damaging  
software, loss of use of the ability to listen to the music on the CDs, and the purchase price of the  
CDs.

26 154. Sony BMG has engaged in unfair, unlawful and fraudulent business practices as  
27 set forth above.

28 155. By engaging in the above-described acts and practices, Sony BMG has committed

1 one or more unfair business practices within the meaning of Bus. & Prof. Code §17200, et seq.  
 2 Specifically, Sony BMG's business practices offend the public policies set forth in California  
 3 Constitution Art. 1, section 1; Civil Code sections 1750 et seq (Consumer Legal Remedies Act);  
 4 Business and Professions Code section 22947 (Consumer Protection Against Computer Spyware  
 5 Act); Business and Professions Code section 17500 et seq.; Business and Professions Code  
 6 sections 22575-579 (Online Privacy Protection Act); and California Penal Code section 502.

7 156. Sony BMG's above-described deceptive and misleading acts and practices have  
 8 and/or are likely to deceive Plaintiffs and other Class members.

9 157. Sony BMG's acts and practices are also unlawful because they violate Civil Code  
 10 sections 1750 et seq (Consumer Legal Remedies Act); Business and Professions Code section  
 11 22947 (Consumer Protection Against Computer Spyware Act); and California Penal Code  
 12 section 502.

13 158. Specifically, Sony BMG marketed and sold the XCP and MediaMax CDs in  
 14 defective condition and deceptively failed to disclose their defects as described above; advertised  
 15 its XCP and MediaMax CDs with intent not to sell them as advertised; represented that the  
 16 purchase and/or use of its XCP and MediaMax CDs confers or involves rights, remedies, or  
 17 obligations which it does not have or involve, or which are prohibited by law; inserted several  
 18 unconscionable provisions into the EULA that accompanies the XCP and MediaMax CDs  
 19 infected with the XCP and MediaMax software; took control and modified the settings of user's  
 20 computers, collected personally identifiable information about users, tracked users as they listen  
 21 to the CDs and attempted to prevent users from blocking or disabling the XCP and MediaMax  
 22 software; violated the implied covenant of good faith and fair dealing; and failed to comply with  
 23 the implied warranty of merchantability.

24 159. Plaintiffs and the Class have suffered injury in fact and have lost money or  
 25 property as a result of such unfair competition.

26 160. Plaintiffs, on behalf of themselves and on behalf of the Class, seek an order of this  
 27 Court awarding restitution, disgorgement, injunctive relief and all other relief allowed under  
 28 §17200, et seq.

### THIRD CLAIM FOR RELIEF

### **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

161. Plaintiffs incorporate the allegations set forth above by references, as if set forth fully herein.

162. California law implies a covenant of good faith and fair dealing in all contracts between parties entered into in the State of California.

8        163. By engaging in above-described acts and practices, Sony BMG has violated the  
9 implied covenant of good faith and fair dealing in the consumer's purchase of the XCP and  
10 MediaMax CDs.

11 164. By engaging in the above-described acts and practices, Sony BMG has caused  
12 Plaintiffs and the Class to suffer damages in an amount to be determined at trial.

## **FOURTH CLAIM FOR RELIEF**

**(False or Misleading Statements)**

15        165. Plaintiffs incorporate the allegations set forth above by references, as if set forth  
16 fully herein.

17        166. Through its advertising practices, promotional materials, packaging, EULA,  
18 public statements, and other acts and practices described herein, Sony BMG has made untrue and  
19 misleading statements and omitted material facts in violation of California Business and  
20 Professions Code §§17500, et seq.

167. The misrepresentations, omissions and other misleading conduct described herein  
concerning the XCP and MediaMax CDs were "likely to deceive." These misrepresentations and  
omissions continue to this date.

24 168. Sony BMG knows or should know that these misrepresentations and omissions  
25 concerning the XCP and MediaMax CDs are false and misleading.

26 169. Plaintiffs and the Class were actually deceived by the misrepresentations and  
27 omissions.

28 170. Plaintiffs and the Class relied on these misrepresentations and omissions to their

1 detriment.

2 171. Plaintiffs and the Class have been harmed. Plaintiffs, on behalf of themselves and  
3 on behalf of the Class seek restitution, disgorgement, injunctive relief and all other relief  
4 allowable under §17500, et seq.

5 **PRAYER FOR RELIEF**

6 172. For compensatory damages in an amount to be proven at trial.

7 173. For restitution and disgorgement of profits realized as a result of the unlawful  
8 conduct of defendants.

9 174. For any treble and/or punitive damages to the extent permitted by law.

10 175. For equitable relief, including but not limited to, requiring Sony BMG to:

11 a) Notify consumers, through widespread publicity, of the potential  
12 security and other risks associated with the XCP and MediaMax  
13 technology, to allow consumers to make informed decisions  
14 regarding their use of those CDs. The notification process should  
15 include issuing a public statement describing the risks associated  
16 with *both* XCP and MediaMax software and listing every Sony  
17 BMG CD, DVD or other product that contains MediaMax software.  
18 In addition, Sony BMG must use the banner communication system  
19 incorporated in its software to advise consumers that refunds and  
20 uninstall software is available. The notifications must be  
21 reasonably calculated to reach all consumers who have purchased the  
22 products.

23 b) Cooperate fully with any interested manufacturer of anti-virus, anti-  
24 spyware, or similar computer security tools, and with security  
25 researchers, to facilitate the identification and complete removal of  
26 both XCP and MediaMax software from the computers of those  
27 infected. Among other actions, Sony BMG should publicly waive  
28 any claims it may have against such vendors or researchers under the

EULA, the Digital Millennium Copyright Act (DMCA) and any similar laws.

- c) Refund the purchase price of the CDs containing XCP technology for those consumers who prefer a refund to a replacement CD.
- d) Refund the purchase price of the CDs containing MediaMax technology or, *at the consumer's election*, provide a replacement CD that does not contain the MediaMax technology. For those consumers who choose to retain CDs containing the MediaMax technology, develop and make widely available a software update that will allow consumers to easily uninstall the technology without losing the ability to play the CD on their computers, without causing further damage to their computers, and without revealing any personally identifying information.
- e) To avoid future abuses, prior to releasing any future product containing technology with similar functions, thoroughly test the software to determine the existence of any security risks or other possible damages the technology might cause to any user's computer AND certify in a statement included in the packaging of every CD containing the technology that the product does not contain any concealed software such as the XCP rootkit, does not electronically communicate with Sony BMG or any other party nor initiate the download of any software update or other data without informed consent of the consumer immediately prior to each communication, can be uninstalled without any need to contact and/or disclose personal information to Sony BMG or its affiliates and agents, does not present any security risks to any consumer's computer, and will not damage or reduce the functionality of the consumer's computer in any way.

1 176. For the award to Plaintiffs of their attorneys' fees and other costs of suit.

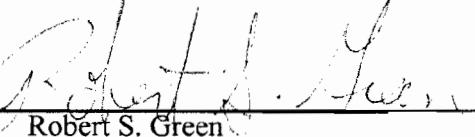
2 177. For such other and further relief as the Court deems just and equitable.

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4 DATED: November 21, 2005

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**EXHIBIT A**

IMPORTANT-READ CAREFULLY: This compact disc ("CD") product contains standard so-called "Red Book" compliant audio files that can be played on any standard CD player, including those contained in many personal home computer systems. As an added feature, this compact disc ("CD") product also enables you to convert these audio files into digital music files and/or may also contain other already existing digital content (such files and content, collectively, the "DIGITAL CONTENT"), any of which may be stored on the hard drive of a personal home computer system owned by you ("YOUR COMPUTER") and accessed via YOUR COMPUTER or certain approved, compatible portable devices owned by you (each, an "APPROVED PORTABLE DEVICE").

Before you can play the audio files on YOUR COMPUTER or create and/or transfer the DIGITAL CONTENT to YOUR COMPUTER, you will need to review and agree to be bound by an end user license agreement or "EULA", the terms and conditions of which are set forth below. Once you have read these terms and conditions, you will be asked whether or not you agree to be bound by them. Click "AGREE" if you agree to be bound. Click "DISAGREE" if you do not agree to be bound. Please keep in mind, however, that if you do not agree to be bound by these terms and conditions, you will not be able to utilize the audio files or the DIGITAL CONTENT on YOUR COMPUTER.

As soon as you have agreed to be bound by the terms and conditions of the EULA, this CD will automatically install a small proprietary software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is intended to protect the audio files embodied on the CD, and it may also facilitate your use of the DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER until removed or deleted. However, the SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.

Once the SOFTWARE has been installed on YOUR COMPUTER, a menu will then appear on the screen of YOUR COMPUTER, giving you the option of playing the audio files on YOUR COMPUTER, creating a copy of the DIGITAL CONTENT directly onto the hard drive of YOUR COMPUTER, or making a limited number of back-up copies of the CD onto other, recordable CDs. If you choose to create a copy of the DIGITAL CONTENT, the menu will then prompt you to select a file format for the DIGITAL CONTENT. Once you have selected a file format, a copy of the DIGITAL CONTENT will automatically be created in that file format and transferred onto the hard drive of YOUR COMPUTER, where you will be able to access it using an APPROVED MEDIA PLAYE (see below) or, at you election, transfer it from YOUR COMPUTER onto an APPROVED PORTABLE DEVICE.

In order to access the DIGITAL CONTENT on YOUR COMPUTER, you will need to have a copy of an approved media player software program that is capable of playing the DIGITAL CONTENT in the file format you selected (each such approved media player, an "APPROVED MEDIA PLAYER") on YOUR COMPUTER. You may already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER. If you do, you will be able to play the DIGITAL CONTENT on YOUR COMPUTER without doing anything further. This CD may also contain an APPROVED MEDIA PLAYER for the file format you selected. If it does, the menu that appears on the screen of YOUR COMPUTER will prompt you on how to transfer a copy of that APPROVED MEDIA PLAYER onto YOUR COMPUTER. To the extent you utilize an APPROVED MEDIA PLAYER

contained on this CD, your use of such APPROVED MEDIA PLAYER may be subject, in each instance, to separate terms and conditions provided by the owner of the APPROVED MEDIA PLAYER concerned. If you do not already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER, and if this CD does not contain a compatible APPROVED MEDIA PLAYER, then you will then need to secure a compatible APPROVED MEDIA PLAYER elsewhere (e.g., on an Internet website, where you can download one).

#### END-USER LICENSE AGREEMENT

This End-User License Agreement ("EULA") is a legal agreement between you and SONY BMG MUSIC ENTERTAINMENT ("SONY BMG"), a general partnership established under Delaware law. By clicking on the "AGREE" button below, you will indicate your acceptance of these terms and conditions, at which point this EULA will become a legally binding agreement between you and SONY BMG.

#### Article 1. GRANT OF LICENSE

1. Subject to your agreement to the terms and conditions set forth in this EULA, SONY BMG grants to you a personal, non-exclusive and non-transferable license, with no right to grant sublicenses, to:

- (a) install one (1) copy of SOFTWARE onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
- (b) install one (1) copy of any APPROVED MEDIA PLAYER(S) contained on this CD onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
- (c) use the SOFTWARE and any APPROVED MEDIA PLAYER(S) contained on this CD to access the DIGITAL CONTENT on YOUR COMPUTER or on an APPROVED PORTABLE DEVICE;

in each instance, solely for your own personal and private use and not for any other purpose (including, without limitation, any act of electronic or physical distribution, making available, performance or broadcast, or any act for profit or other commercial purpose) and in accordance with the terms and conditions set forth in this EULA.

2. The DIGITAL CONTENT and the SOFTWARE contained on this CD are sometimes referred to herein, collectively, as the "LICENSED MATERIALS".

#### Article 2. PRODUCT FEATURES

1. This CD contains technology that is designed to prevent users from making certain, unauthorized uses of the DIGITAL CONTENT, including, without limitation, the following:

- (1) making and storing more than one (1) copy of the DIGITAL CONTENT in each available file format on the hard drive of YOUR COMPUTER;
- (2) accessing the DIGITAL CONTENT on YOUR COMPUTER (once you have installed a copy of it on the hard drive of YOUR COMPUTER) using a media player that is not an APPROVED MEDIA PLAYER;
- (3) transferring copies of the DIGITAL CONTENT that reside on the hard drive of YOUR COMPUTER on to portable devices that are not APPROVED PORTABLE DEVICES;
- (4) burning more than three (3) copies of the DIGITAL CONTENT stored on YOUR COMPUTER (ATRAC OpenMG file format only) onto AtracCDs;
- (5) burning more than three (3) copies of the DIGITAL CONTENT onto recordable compact discs in the so-called "Red Book"-compliant audio file format; and
- (6) burning more than three (3) backup copies of this CD (using the

burning application provided on the CD) onto recordable CDs and burning or otherwise making additional copies from the resulting backup copies.

2. PLEASE NOTE: Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS may be subject to additional restrictions, under applicable copyright and other laws, that are not enforced or prescribed by any technology contained on this CD. The absence of any such technology designed to enforce these additional restrictions should in no way be viewed or interpreted as a waiver, on the part of SONY BMG or any other person or entity owning any rights in any of the LICENSED MATERIALS, of their respective rights to enforce any such additional restrictions regarding your use of the LICENSED MATERIALS. Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS shall, at all times, remain subject to any and all applicable laws governing the use of such materials, including, without limitation, any restrictions on your use prescribed therein.

3. All of your rights to enjoy the DIGITAL CONTENT, as described herein, shall be subject to your continued ownership of all rights in and to the physical CD on which such DIGITAL CONTENT is embodied; should you transfer your ownership rights in the physical CD on which such DIGITAL CONTENT is embodied (in whole or in part) to any other person (whether by sale, gift or otherwise), your rights in both the physical CD and such DIGITAL CONTENT shall terminate.

#### Article 3. RESTRICTIONS ON USE OF LICENSED MATERIALS

1. Except to the extent otherwise expressly permitted hereunder or otherwise by the owner of the relevant rights in or to the LICENSED MATERIALS concerned, and without limitation, the following restrictions shall apply to your use of the LICENSED MATERIALS:

- (a) You may not copy or reproduce any portion of the LICENSED MATERIALS.
- (b) You may not distribute, share through any information network, transfer, sell, lease or rent any of the LICENSED MATERIALS to any other person, in whole or in part.
- (c) You may not change, alter, modify or create derivative works, enhancements, extensions or add-ons to any of the LICENSED MATERIALS.
- (d) You may not decompile, reverse engineer or disassemble any of the LICENSED MATERIALS, in whole or in part.
- (e) You may not export the LICENSED MATERIALS outside of the country where you reside. (This clause 1(e) of Article 3 shall not be applicable within the European Economic Area (EEA).)
- (f) You will at all times comply with, and will not circumvent or attempt to circumvent, any of the restrictions on use set forth in this Article 3 or elsewhere in this EULA.

2. In the event that the owner of the LICENSED MATERIALS is a party other than SONY BMG (each, a "LICENSOR"), you agree that such LICENSOR shall be a third party beneficiary under this EULA and, as such, shall have the right to enforce the terms and conditions of this EULA that pertain directly to such LICENSOR'S rights in and to the LICENSED MATERIALS concerned as if such LICENSOR was a party to this EULA. The rights granted to a Licensor under this Article shall not be revoked.

3. SONY BMG and each LICENSOR reserve the right to use the SOFTWARE and/or any APPROVED MEDIA PLAYER to enforce their respective rights in and to the DIGITAL CONTENT, including any and all of the restrictions on use set forth in this Article 3, at any time, without notice to you.

#### Article 4. INTELLECTUAL PROPERTY RIGHTS

All title to, and intellectual property rights in, the LICENSED

MATERIALS and any related documents are and shall remain owned and/or controlled solely and exclusively by SONY BMG and/or its LICENSORS. SONY BMG and/or all respective LICENSORS reserve all rights in the LICENSED MATERIALS not specifically granted to you under this EULA.

**Article 5. EXCLUSION OF WARRANTIES**

YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT YOU ARE INSTALLING AND USING THE LICENSED MATERIALS AT YOUR OWN SOLE RISK. THE LICENSED MATERIALS ARE PROVIDED "AS IS" AND WITHOUT WARRANTY, TERM OR CONDITION OF ANY KIND, AND SONY BMG, ITS LICENSORS AND EACH OF THEIR LICENSEES, AFFILIATES AND AUTHORIZED REPRESENTATIVES (EACH, A "SONY BMG PARTY") EXPRESSLY DISCLAIM ALL WARRANTIES, TERMS OR CONDITIONS. EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, NON-INFRINGEMENT AND FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. NO ORAL, WRITTEN OR ELECTRONIC INFORMATION OR ADVICE GIVEN BY ANY SONY BMG PARTY SHALL CREATE ANY WARRANTY, TERM OR CONDITION WITH RESPECT TO THE LICENSED MATERIALS OR OTHERWISE. SHOULD THE LICENSED MATERIALS PROVE TO BE DEFECTIVE, YOU (AND NOT THE SONY BMG PARTY CONCERNED) AGREE TO ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIRS OR CORRECTIONS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, TERMS OR CONDITIONS IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY MANDATES LIABILITY, DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 6. LIMITATION OF LIABILITY**

NO SONY BMG PARTY SHALL BE LIABLE FOR ANY LOSS OR DAMAGE, EITHER DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR OTHERWISE, ARISING OUT OF THE BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, TERM OR CONDITION, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY MISREPRESENTATION, FAILURE OF ANY REMEDY TO ACHIEVE ITS ESSENTIAL PURPOSE OR ANY OTHER LEGAL THEORY ARISING OUT OF, OR RELATED TO, THIS EULA OR YOUR USE OF ANY OF THE LICENSED MATERIALS (SUCH DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF DATA, LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT, DOWN TIME AND USER'S TIME), EVEN IF THE SONY BMG PARTY CONCERNED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, THE ENTIRE LIABILITY OF THE SONY BMG PARTIES, COLLECTIVELY, UNDER THE PROVISIONS OF THIS EULA SHALL BE LIMITED TO FIVE US DOLLARS (US \$5.00). SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY REQUIRES LIABILITY DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 7. DAMAGES ARISING OUT OF YOUR ACTIONS**

You shall defend and hold the SONY BMG PARTIES harmless from and against any and all liabilities, damages, costs, expenses or losses arising out of your use of the LICENSED MATERIALS, your negligent or wrongful acts, your violation of any applicable laws or regulations, and/or your breach of any provision of this EULA.

**Article 8. UPDATES TO THE LICENSED MATERIALS**

The SONY BMG PARTIES may from time to time provide you with updates of the SOFTWARE in a manner that the SONY BMG PARTIES deem to be appropriate. All such updates shall be deemed to be part of the

SOFTWARE for all purposes hereunder. In the event that you fail to install an update, the SONY BMG PARTIES reserve the right to terminate the term of this EULA, along with your rights to use the LICENSED MATERIALS, immediately, without additional notice to you. The SONY BMG PARTIES shall not be liable for any loss or damage caused by reason of your failure to install any such update or your failure to do so in the manner instructed.

**Article 9. EXPIRATION AND TERMINATION**

1. The rights granted to you hereunder to use the DIGITAL CONTENT are conditioned upon your continued possession of, and your continued right under a license from SONY BMG to use, the original CD product that you purchased. In the event that you no longer possess or have the right under such license to use the original CD product, your rights hereunder to use the DIGITAL CONTENT shall expire immediately, without notice from SONY BMG.

2. Without prejudice to any other rights SONY BMG or any SONY BMG PARTY may have hereunder, the term of this EULA shall terminate immediately, without notice from SONY BMG, and all rights you may have hereunder to use the LICENSED MATERIALS shall be immediately revoked, in the event that you: (i) fail to comply with any provision of this EULA(ii) fail to install an update of the SOFTWARE that was previously provided to you by the SONY BMG PARTIES within the time specified, or (iii) file a voluntary petition or are subject to an involuntary petition under applicable bankruptcy laws, are declared insolvent, make an assignment for the benefit of creditors, or are served with a writ of attachment, writ of execution, garnishment or other legal process pertaining to any of your assets or property.

3. Upon the expiration or termination of this EULA, you shall immediately remove all of the LICENSED MATERIALS from your personal computer system and delete or destroy them, along with any related documentation (and any copies thereof) that you may have received or otherwise may possess.

4. Articles 4 (Intellectual Property Rights), 6 (Limitation of Liability), 7 (Damages Arising Out Of Your Actions), 9 (Expiration and Termination), 10 (Governing Law and Waiver of Trial By Jury), and 11 (General) shall survive and remain in full force and effect following the expiration or termination of this EULA.

5. To the extent relevant under applicable law, you and SONY BMG each agree, for the effectiveness of the termination clauses under this EULA, to waive any provisions, procedures and operation of any applicable law that might otherwise require judicial approval or a court order in order to effect the termination of this EULA.

**Article 10. GOVERNING LAW AND WAIVER OF TRIAL BY JURY**

1. THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS EULA SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW). THE NEW YORK COURTS (STATE AND FEDERAL), SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS IN NEW YORK COUNTY AND NOT ELSEWHERE. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS.

2. YOU HEREBY WAIVE ALL RIGHTS AND/OR ENTITLEMENT TO TRIAL BY JURY IN CONNECTION WITH ANY DISPUTE THAT ARISES OUT OF OR RELATES IN ANY WAY

TO THIS EULA OR THE SOFTWARE.

**Article 11. GENERAL**

If any provision of this EULA is subsequently held to be invalid or unenforceable by any court or other authority, such invalidity or unenforceability shall in no way affect the validity or enforceability of any other provision of this EULA. This EULA shall be binding upon the parties' authorized successors and assignees. Neither party's waiver of any breach or failure to enforce any of the provision of this EULA at any time shall in any way affect, limit or waive such party's right there after to enforce and compel strict compliance with every other provision. No modification of this EULA shall be effective unless it is set forth in a writing signed by SONY BMG.

**EXHIBIT B**

**IMPORTANT-READ CAREFULLY:** This compact disc ("CD") product contains standard so-called "Red Book"-compliant audio files that can be played on any standard CD player, including those contained in many personal home computer systems. As an added feature, this compact disc ("CD") product also enables you to convert these audio files into digital music files and/or may also contain other already existing digital content (such files and content, collectively, the "DIGITAL CONTENT"), any of which may be stored on the hard drive of a personal home computer system owned by you ("YOUR COMPUTER") and accessed via YOUR COMPUTER or certain approved, compatible portable devices owned by you (each, an "APPROVED PORTABLE DEVICE").

Before you can play the audio files on YOUR COMPUTER or create and/or transfer the DIGITAL CONTENT to YOUR COMPUTER, you will need to review and agree to be bound by an end user license agreement or "EULA", the terms and conditions of which are set forth below. Once you have read these terms and conditions, you will be asked whether or not you agree to be bound by them. Click "AGREE" if you agree to be bound. Click "DISAGREE" if you do not agree to be bound. Please keep in mind, however, that if you do not agree to be bound by these terms and conditions, you will not be able to utilize the audio files or the DIGITAL CONTENT on YOUR COMPUTER.

**As soon as you have agreed to be bound by the terms and conditions of the EULA, this CD will automatically install** a small proprietary software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is intended to protect the audio files embodied on the CD, and it may also facilitate your use of the DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER until removed or deleted. However, the SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.

Once the SOFTWARE has been installed on YOUR COMPUTER, a menu will then appear on the screen of YOUR COMPUTER, giving you the option of playing the audio files on YOUR COMPUTER, creating a copy of the DIGITAL CONTENT directly onto the hard drive of YOUR COMPUTER, or making a limited number of back-up copies of the CD onto other, recordable CDs. If you choose to create a copy of the DIGITAL CONTENT, the menu will then prompt you to select a file format for the DIGITAL CONTENT. Once you have selected a file format, a copy of the DIGITAL CONTENT will automatically be created in that file format and transferred onto the hard drive of YOUR COMPUTER, where you will be able to access it using an APPROVED MEDIA PLAYER (see below) or, at your election, transfer it from YOUR COMPUTER onto an APPROVED PORTABLE DEVICE.

In order to access the DIGITAL CONTENT on YOUR COMPUTER, you will need to have a copy of an approved media player software program that is capable of playing the DIGITAL CONTENT in the file format you selected (each such approved media player, an "APPROVED MEDIA PLAYER") on YOUR COMPUTER. You may already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER. If you do, you will be able to play the DIGITAL CONTENT on YOUR COMPUTER without doing anything further. This CD may also contain an APPROVED MEDIA PLAYER for the file format you selected. If it does, the menu that appears on the screen of YOUR COMPUTER will prompt you on how to transfer a copy of that APPROVED MEDIA PLAYER onto YOUR COMPUTER. To the extent you utilize an APPROVED MEDIA PLAYER contained on this CD, your use of such APPROVED MEDIA PLAYER may be subject, in each instance, to separate terms and conditions provided by the owner of the APPROVED MEDIA PLAYER concerned. If you do not already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER, and if this CD does not contain a compatible APPROVED MEDIA PLAYER, then you will then need to secure a compatible APPROVED MEDIA PLAYER elsewhere (e.g., on an Internet website, where you can download one).

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##### **Article I. GRANT OF LICENSE**

1. Subject to your agreement to the terms and conditions set forth in this EULA, SONY BMG grants to you a personal, non-exclusive and non-transferable license, with no right to grant sublicenses, to:
  - (a) install one (1) copy of SOFTWARE onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
  - (b) install one (1) copy of any APPROVED MEDIA PLAYER(S) contained on this CD onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
  - (c) use the SOFTWARE and any APPROVED MEDIA PLAYER(S) contained on this CD to access the DIGITAL CONTENT on YOUR COMPUTER or on an APPROVED PORTABLE DEVICE;

in each instance, solely for your own personal and private use and not for any other purpose (including, without limitation, any act of electronic or physical distribution, making available, performance or broadcast, or any act for profit or other commercial purpose) and in accordance with the terms and conditions set forth in this EULA.

2. The DIGITAL CONTENT and the SOFTWARE contained on this CD are sometimes referred to herein, collectively, as the "LICENSED MATERIALS".

#### Article 2. PRODUCT FEATURES

1. This CD contains technology that is designed to prevent users from making certain, unauthorized uses of the DIGITAL CONTENT, including, without limitation, the following:
  - (1) making and storing more than one (1) copy of the DIGITAL CONTENT in each available file format on the hard drive of YOUR COMPUTER;
  - (2) accessing the DIGITAL CONTENT on YOUR COMPUTER (once you have installed a copy of it on the hard drive of YOUR COMPUTER) using a media player that is not an APPROVED MEDIA PLAYER;
  - (3) transferring copies of the DIGITAL CONTENT that reside on the hard drive of YOUR COMPUTER on to portable devices that are not APPROVED PORTABLE DEVICES;
  - (4) burning more than three (3) copies of the DIGITAL CONTENT stored on YOUR COMPUTER (ATRAC OpenMG file format only) onto AtracCDs;
  - (5) burning more than three (3) copies of the DIGITAL CONTENT onto recordable compact discs in the so-called "Red Book"-compliant audio file format; and
  - (6) burning more than three (3) backup copies of this CD (using the burning application provided on the CD) onto recordable CDs and burning or otherwise making additional copies from the resulting backup copies.
2. **PLEASE NOTE:** Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS may be subject to additional restrictions, under applicable copyright and other laws, that are not enforced or prescribed by any technology contained on this CD. The absence of any such technology designed to enforce these additional restrictions should in no way be viewed or interpreted as a waiver, on the part of SONY BMG or any other person or entity owning any rights in any of the LICENSED MATERIALS, of their respective rights to enforce any such additional restrictions regarding your use of the LICENSED MATERIALS. Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS shall, at all times, remain subject to any and all applicable laws governing the use of such materials, including, without limitation, any restrictions on your use prescribed therein.
3. All of your rights to enjoy the DIGITAL CONTENT, as described herein, shall be subject to your continued ownership of all rights in and to the physical CD on which such DIGITAL CONTENT is embodied; should you transfer your ownership rights in the physical CD on which such DIGITAL CONTENT is embodied (in whole or in part) to any other person (whether by sale, gift or otherwise), your rights in both the physical CD and such DIGITAL CONTENT shall terminate.

#### Article 3. RESTRICTIONS ON USE OF LICENSED MATERIALS

1. Except to the extent otherwise expressly permitted hereunder or otherwise by the owner of the relevant rights in or to the LICENSED MATERIALS concerned, and without limitation, the following restrictions shall apply to your use of the LICENSED MATERIALS:
  - (a) You may not copy or reproduce any portion of the LICENSED MATERIALS.
  - (b) You may not distribute, share through any information network, transfer, sell, lease or rent any of the LICENSED MATERIALS to any other person, in whole or in part.
  - (c) You may not change, alter, modify or create derivative works, enhancements, extensions or add-ons to any of the LICENSED MATERIALS.
  - (d) You may not decompile, reverse engineer or disassemble any of the LICENSED MATERIALS, in whole or in part.
  - (e) You may not export the LICENSED MATERIALS outside of the country where you reside. (This clause 1(e) of Article 3 shall not be applicable within the European Economic Area (EEA).)
  - (f) You will at all times comply with, and will not circumvent or attempt to circumvent, any of the restrictions on use set forth in this Article 3 or elsewhere in this EULA.
2. In the event that the owner of the LICENSED MATERIALS is a party other than SONY BMG (each, a "LICENSOR"), you agree that such LICENSOR shall be a third party beneficiary under this EULA and, as such, shall have the right to enforce the terms and conditions of this EULA that pertain directly to such LICENSOR'S rights in and to the LICENSED MATERIALS concerned as if such LICENSOR was a party to this EULA. The rights granted to a Licensor under this Article shall not be revoked.
3. SONY BMG and each LICENSOR reserve the right to use the SOFTWARE and/or any APPROVED MEDIA PLAYER to enforce their respective rights in and to the DIGITAL CONTENT, including any and all of the restrictions on use set forth in this Article 3, at any time, without notice to you.

#### Article 4. INTELLECTUAL PROPERTY RIGHTS

All title to, and intellectual property rights in, the LICENSED MATERIALS and any related documents are and shall remain owned and/or controlled solely and exclusively by SONY BMG and/or its LICENSORS. SONY BMG and/or all respective LICENSORS reserve all rights in the LICENSED MATERIALS not specifically granted to you under this EULA.

#### Article 5. EXCLUSION OF WARRANTIES

YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT YOU ARE INSTALLING AND USING THE LICENSED MATERIALS AT YOUR OWN SOLE RISK. THE LICENSED MATERIALS ARE PROVIDED "AS IS" AND WITHOUT WARRANTY, TERM OR CONDITION OF ANY KIND, AND SONY BMG, ITS LICENSORS AND EACH OF THEIR LICENSEES, AFFILIATES AND AUTHORIZED REPRESENTATIVES (EACH, A "SONY BMG PARTY") EXPRESSLY DISCLAIM ALL WARRANTIES, TERMS OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, NON-INFRINGEMENT AND FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. NO ORAL, WRITTEN OR ELECTRONIC INFORMATION OR ADVICE GIVEN BY ANY SONY BMG PARTY SHALL CREATE ANY WARRANTY, TERM OR CONDITION WITH RESPECT TO THE LICENSED MATERIALS OR OTHERWISE. SHOULD THE LICENSED MATERIALS PROVE TO BE DEFECTIVE, YOU (AND NOT THE SONY BMG PARTY CONCERNED) AGREE TO ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIRS OR CORRECTIONS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, TERMS OR CONDITIONS IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY MANDATES LIABILITY, DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

#### Article 6. LIMITATION OF LIABILITY

NO SONY BMG PARTY SHALL BE LIABLE FOR ANY LOSS OR DAMAGE, EITHER DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR OTHERWISE, ARISING OUT OF THE BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, TERM OR CONDITION, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY MISREPRESENTATION, FAILURE OF ANY REMEDY TO ACHIEVE ITS ESSENTIAL PURPOSE OR ANY OTHER LEGAL THEORY ARISING OUT OF, OR RELATED TO, THIS EULA OR YOUR USE OF ANY OF THE LICENSED MATERIALS (SUCH DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF DATA, LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT, DOWN TIME AND USER'S TIME), EVEN IF THE SONY BMG PARTY CONCERNED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, THE ENTIRE LIABILITY OF THE SONY BMG PARTIES, COLLECTIVELY, UNDER THE PROVISIONS OF THIS EULA SHALL BE LIMITED TO FIVE US DOLLARS (US \$5.00). SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY REQUIRES LIABILITY DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

#### Article 7. DAMAGES ARISING OUT OF YOUR ACTIONS

You shall defend and hold the SONY BMG PARTIES harmless from and against any and all liabilities, damages, costs, expenses or losses arising out of your use of the LICENSED MATERIALS, your negligent or wrongful acts, your violation of any applicable laws or regulations, and/or your breach of any provision of this EULA.

#### Article 8. UPDATES TO THE LICENSED MATERIALS

The SONY BMG PARTIES may from time to time provide you with updates of the SOFTWARE in a manner that the SONY BMG PARTIES deem to be appropriate. All such updates shall be deemed to be part of the SOFTWARE for all purposes hereunder. In the event that you fail to install an update, the SONY BMG PARTIES reserve the right to terminate the term of this EULA, along with your rights to use the LICENSED MATERIALS, immediately, without additional notice to you. The SONY BMG PARTIES shall not be liable for any loss or damage caused by reason of your failure to install any such update or your failure to do so in the manner instructed.

**Article 9. EXPIRATION AND TERMINATION**

1. The rights granted to you hereunder to use the DIGITAL CONTENT are conditioned upon your continued possession of, and your continued right under a license from SONY BMG to use, the original CD product that you purchased. In the event that you no longer possess or have the right under such license to use the original CD product, your rights hereunder to use the DIGITAL CONTENT shall expire immediately, without notice from SONY BMG.
2. Without prejudice to any other rights SONY BMG or any SONY BMG PARTY may have hereunder, the term of this EULA shall terminate immediately, without notice from SONY BMG, and all rights you may have hereunder to use the LICENSED MATERIALS shall be immediately revoked, in the event that you: (i) fail to comply with any provision of this EULA, (ii) fail to install an update of the SOFTWARE that was previously provided to you by the SONY BMG PARTIES within the time specified, or (iii) file a voluntary petition or are subject to an involuntary petition under applicable bankruptcy laws, are declared insolvent, make an assignment for the benefit of creditors, or are served with a writ of attachment, writ of execution, garnishment or other legal process pertaining to any of your assets or property.
3. Upon the expiration or termination of this EULA, you shall immediately remove all of the LICENSED MATERIALS from your personal computer system and delete or destroy them, along with any related documentation (and any copies thereof) that you may have received or otherwise may possess.
4. Articles 4 (Intellectual Property Rights), 6 (Limitation of Liability), 7 (Damages Arising Out Of Your Actions), 9 (Expiration and Termination), 10 (Governing Law and Waiver of Trial By Jury), and 11 (General) shall survive and remain in full force and effect following the expiration or termination of this EULA.
5. To the extent relevant under applicable law, you and SONY BMG each agree, for the effectiveness of the termination clauses under this EULA, to waive any provisions, procedures and operation of any applicable law that might otherwise require judicial approval or a court order in order to effect the termination of this EULA.

**Article 10. GOVERNING LAW AND WAIVER OF TRIAL BY JURY**

1. THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS EULA SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW). THE NEW YORK COURTS (STATE AND FEDERAL), SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS IN NEW YORK COUNTY AND NOT ELSEWHERE. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS.
2. YOU HEREBY WAIVE ALL RIGHTS AND/OR ENTITLEMENT TO TRIAL BY JURY IN CONNECTION WITH ANY DISPUTE THAT ARISES OUT OF OR RELATES IN ANY WAY TO THIS EULA OR THE SOFTWARE.

**Article 11. GENERAL**

If any provision of this EULA is subsequently held to be invalid or unenforceable by any court or other authority, such invalidity or unenforceability shall in no way affect the validity or enforceability of any other provision of this EULA. This EULA shall be binding upon the parties' authorized successors and assignees. Neither party's waiver of any breach or failure to enforce any of the provision of this EULA at any time shall in any way affect, limit or waive such party's right thereafter to enforce and compel strict compliance with every other provision. No modification of this EULA shall be effective unless it is set forth in a writing signed by SONY BMG.